



**THE ATTORNEY GENERAL
OF TEXAS**

December 1, 1987

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Mike Thompson
Assistant City Attorney
377 City-County Building
El Paso, Texas 79999

Open Records Decision No. 484

Re: Whether information requested from the city of El Paso is subject to required disclosure under the Open Records Act, article 6252-17a, V.T.C.S., and effect on the status of this information of provisions of a collectively bargained agreement authorized by article 5154c-1, V.T.C.S. (RQ-1105)

Dear Mr. Thompson:

You have received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for information about complaints against 68 police officers of the El Paso Police Department. The requestor seeks the complaints against the officers, identification of complainants and disposition of complaints.

The records you submit to us consist of a "History Card" for each police officer. The history cards allow for brief notations on each complaint under the following headings: date, case number, complainant, allegations, and disposition. The complaint is described in a single word, or a brief phrase, without any detail. The dispositions of complaints are generally recorded as "unfounded," "not sustained," "sustained" or "information only."

You inform us that an "unfounded" complaint indicates that an investigation was made, but there was no evidence to substantiate the complaint. A "not sustained" complaint indicates that there was some evidence, but it was not sufficient to sustain the complaint against the officer. A notation of "sustained" indicates that the evidence sustained the complaint. The history card reflects any action taken. "Information only" indicates

that the person reporting an incident did not wish an investigation or prosecution of the officer, but merely wished to report the incident. Some complaints show that they relate to off-duty conduct. There are also notations of "witness only," which means that the officer was called on as a witness.

The city of El Paso and the El Paso Municipal Police Officers Association have entered into a collective bargaining agreement pursuant to article 5154c-1, V.T.C.S. The agreement provides that unfounded complaints against an employee shall not be entered into his personnel jacket, while complaints that are not sustained and written reprimands may be expunged after a lapse of time. Finally, the city retains the right to maintain confidential files in the Internal Affairs Unit.

Governmental bodies may not by rule or contract render information confidential if the Open Records Act would otherwise subject it to public disclosure. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976); Open Records Decision Nos. 283 (1981); 55A (1975). Article 5154c-1, V.T.C.S., does not contain any provision expressly authorizing the signatories to remove information from the coverage of the Open Records Act.¹ Thus, none of the information included on the history cards is excepted from public disclosure by the contract in this case.

The city argues, first, that the information may be withheld because of pending litigation. Section 3(a)(3) of the Open Records Act excepts from required disclosure:

(3) information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or

1. The 70th Legislature has amended article 1269m, V.T.C.S., to expressly authorize a fire fighters' and police officers' civil service commission to remove reports of unjustified disciplinary action from personnel files. See H.B. No. 1368, Acts 1987, 70th Leg., ch. 300, §1, at 3294. Article 1269m, V.T.C.S., is also amended to include provisions on access to fire fighters' and police officers' personnel files by the employee himself and by members of the public. Id. at 3295-96.

political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection. . . .

You state that one police officer has filed a grievance based on the contract because of a similar request for his records. He claims his records should have been expunged pursuant to contract provisions. The city attorney has determined that these records should be withheld because of this litigation.

You do not indicate in what manner the information on the officers' history cards relates to the grievance of a particular policeman. Therefore, you have not carried your burden of proof on the applicability of the litigation exception to these records.

Prior opinions of this office have held that certain facts about complaints against law enforcement officers are available to the public, including the officer's name, the name of the complainant, the nature of the complaint, and the law enforcement agency's disposition. See generally Open Records Decision Nos. 397 (1983); 350, 342, 329 (1982); 208 (1978). This information as a general rule is not protected by a constitutional or common law right of privacy incorporated into section 3(a)(1) of the Open Records Act. See Open Records Decision No. 208 (1978). See also Open Records Decision No. 444 (1986).

You, however, raise an argument that was not considered in the cited Open Records Decisions. You claim that the doctrine of false light privacy under section 3(a)(1) of the Open Records Act excepts from disclosure the complaint, the complainant's name and the disposition of the complaint in every case where there is a finding of "unfounded" or "not sustained." You inform us that the custodian of the records entertains serious doubts as to the truth of the information when the disposition is "unfounded" or "not sustained."

In Open Records Decision No. 372 (1983) this office said that

a governmental body may withhold information on the basis of false light privacy, only if it finds, based upon the weight of evidence demonstrable to this office, that there is serious doubt about the truth of the information. In addition, the information must be highly offensive to a reasonable person and the public interest in disclosure must be minimal.

See also Open Records Decision No. 468 (1987) (false light privacy doctrine applied to a particular unfounded allegation of police misconduct). The history cards include no evidentiary details about the complained-of conduct. The department's determination following an investigation that a complaint was "unfounded" demonstrates to this office that there is serious doubt about the truth of the information. The determination that a complaint was "not sustained" indicates that there was some evidence supporting the complaint, but that it was not sufficient to sustain it. We cannot be certain that the finding of "not sustained" necessarily demonstrates that there was serious doubt about the truth of the information. Since the evidence for and against the truth of a particular complaint has not been submitted to us, we cannot evaluate the city attorney's determination that there is serious doubt about the truth of "unsustained" complaints. We will, however, for purposes of this decision assume without deciding that there is serious doubt about the truth of "not sustained" complaints.

Many of the "unfounded" and "not sustained" complaints involve allegations of brutality, excessive force, physical abuse, verbal abuse, rudeness, overstepping authority, and "violation of rules and regulations." Other charges include theft, false arrest, damage to property, and unprofessional conduct. The disclosure of most of these charges would be "highly offensive to a reasonable person" who has been the subject of such charges. However, the public interest in the complaints and their resolution by the police department is substantial. See Open Records Decision No. 208 (1978) and authorities cited therein. Moreover, in concluding that the false light privacy doctrine did not apply to allegations that a city employee engaged in illegal on-the-job conduct, this office said:

[W]e believe that the general public has a compelling interest in knowing about

allegations concerning the manner in which a Neighborhood Services Representative of the city of Dallas performs her job duties.

Open Records Decision No. 400 (1983). The public interest in knowing how the El Paso Police Department has resolved these complaints against officers outweighs the officer's interest in withholding most of the "unfounded" and "not sustained" complaints from the public.

The decision that a claim was found to be unwarranted will be released along with other complaint information, and this should mitigate the harm that might result from disclosure of the complaint information alone. See Open Records Decision No. 400 (1983). Moreover, the complaints consist of a one- or two-word description of the conduct. There are no details about a particular officer's conduct nor any graphic or sensational details which might increase the offensiveness of disclosing such allegations to the public. See Open Records Decision No. 468 (1987) (false light privacy doctrine permits withholding portion of letter stating unfounded charges against policeman).

A few of the unfounded allegations are so serious that public disclosure of them would be excessively offensive. In these cases, we believe the doctrine of false light privacy permits these entries to be withheld. We have marked the records accordingly. See Open Records Decision No. 468 (1987).

You next allege that disclosure of complaints relevant to off-duty incidents would invade the individual's right of privacy, which is protected by the doctrines of common law and constitutional privacy as incorporated under section 3(a)(1). Constitutional privacy protects information within certain "zones of privacy" including matters related to marriage, procreation, contraception, family relationships and child rearing and education. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 680-81 (Tex. 1976). See also Open Records Decision No. 455 (1987) and authorities cited therein. The common law right of privacy prohibits the public disclosure of private facts if the information includes intimate or embarrassing facts about a person's private affairs such that the release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. Industrial Foundation of the South v. Texas Industrial Accident Board, supra.

The description of off-duty incidents include the following: off-duty injury, off-duty traffic accident, off-duty assault, off-duty interference with police duties, and outside employment. These complaints do not include intimate or embarrassing facts about the individual's private affairs. Moreover, there is a legitimate public interest in knowing some of this information, specifically, that an officer was charged with interference with police duties while off duty, and that an officer held outside employment.

Some of the history cards include information about off-duty matters involving the officer's family. These matters include intimate or embarrassing facts about the private affairs of the individual peace officer and his family. Thus, they meet the first branch of the test for common law privacy. We do not believe there is a legitimate public interest in knowing about events involving an officer's family merely because they are noted on his history card. The relevant entries are marked for deletion.

You also claim exemption from disclosing entries where a supervisor reports a subordinate for violating procedure, because these items are not truly complaints, but records of an administrative matter with possible discipline. The person who made the request under the Open Records Act requested "complaints." If you do not know whether she intended "complaints" to include supervisor reports about a subordinate, you should consult her.

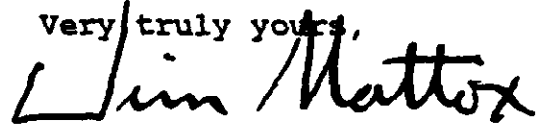
You have raised no exception under the Open Records Act with respect to the supervisor reports. Accordingly, all of the requested complaint entries, except for those we have marked, are available to the requestor under the Open Records Act.

S U M M A R Y

The collectively bargained agreement between El Paso and its policemen, entered into under the terms of article 5154c-1, V.T.C.S., cannot operate to permit information to be withheld from the public if that information cannot be withheld under the Open Records Act. This decision also reviews complaint information against 68 El Paso police officers, consisting of the

officer's name, nature of the complaint, and disposition, regarding exception from public disclosure by the false light privacy doctrine and by a right of personal privacy incorporated into section 3(a)(1) of article 6252-17a, V.T.C.S., the Open Records Act.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Jim Mattox". The signature is fluid and cursive, with the first name "Jim" and last name "Mattox" clearly distinguishable.

J I M M A T T O X
Attorney General of Texas

MARY KELLER
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RICK GILPIN
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